(A)

No. 84-0315

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER,
VERMONT DEPARTMENT OF
MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

REPLY TO PETITION FOR REHEARING

Andrew M. Eschen
Assistant Attorney General
Office of the Attorney General
133 State Street
Montpelier, VT 05602
(802) 828-2831

ATTORNEY FOR APPELLEE

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REPLY TO PETITION FOR REHEARING

I. *HOOPER V. BERNALILLO COUNTY ASSESSOR*, NO. 84-231 (U.S. OCT. 9, 1984) IS INAPPOSITE, AND THE COURT SHOULD AFFIRM ITS ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The Petition for Rehearing, like the Jurisdictional Statement, demonstrates appellant's misinterpretation of the language and administration of the Vermont motor vehicle purchase and use tax, Vt. Stat. Ann. tit. 32, § 8901 *et seq.* Appellant repeatedly argues that the case involves a tax exemption "denied newcomers because they were not residents of the taxing state [Vermont] at some time in the past," Petition at 2, and from this premise asserts that his right to travel has been infringed. Because the premise is incorrect a substantial federal question is not presented.

The Vermont Supreme Court held that it was the act of "registration, and not the move to Vermont [which] triggered the use tax obligation." *Leverson v. Conway*, ___ Vt. ___, 481 A. 2d 1029, 1033 (Vt. 1984). The tax is collected from the user "with the registration application . . . at the time of first registering or transferring a registration to such motor vehicle as condition precedent to registration thereof." Vt. Stat. Ann. tit. 32, § 8905(b). All residents are required to register their vehicles if they desire to use them in the state, Vt. Stat. Ann. tit. 23, § 301, and registration of a motor vehicle is "conclusive evidence that the purchase and use tax applies . . . ." Vt. Stat. Ann. tit. 32, § 8903(c). Hence, liability for the tax does not arise until registration is sought. In appellant's case, the liability for the use tax arose six months after he had accepted employment here. Vt. Stat. Ann. tit. 32, § 8902(2). Prior to that time he had the full use and enjoyment of his automobile in Vermont.

The purpose of the purchase tax and use tax components is to raise revenue "to improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of

those systems and to pay the cost of administering [the tax]." Vt. Stat. Ann. tit. 32, § 8901. The incidence of the tax is upon those who are likely to primarily use this state's facilities - those who register their vehicles in Vermont. The Vermonter who purchases a car in Vermont is liable for the 4% motor vehicle purchase tax. If the Vermonter were to purchase the car in Wisconsin, appellant's prior residence and a reciprocal state, he would be exempt from its sales tax but would nonetheless be liable for this state's 4% use tax upon registration here. If the Vermonter were to register the vehicle in Wisconsin he would not receive credit in Vermont for either the Wisconsin sales or use tax, and would be liable to Vermont for the 4% use tax upon its subsequent registration in this state.[1] Under each scenario a Vermont resident pays his full statutory share for using Vermont's highway facilities - regardless of where the car is purchased. All that Vermont requests of the appellant is that he, too, pay the 4% tax (based upon low book value as of the date of registration). "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates.

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[1] Appellant contends that there is "nothing in the text of [Vt. Stat. Ann. tit. 32, § 8911(9)] or in any other source of Vermont law " to support this assertion. Petition at 9, n. 2. The Commissioner of Motor Vehicles, the appellee, is vested with the authority to interpret and administer the Act. Vt. Stat. Ann. tit. 32, § 8901. Although regulations have not been formally promulgated, the Commissioner has interpreted the repeal of Vt. Stat. Ann. tit. 32, § 8911(6) (the provision which had wholly exempted from the use tax persons who had purchased, registered and used a pleasure car in another state for at least 30 days), as a further manifestation of legislative intent that credit not be afforded when a vehicle had been registered in another state. If the Act were not, in fact, administered as represented by the Commissioner, new residents would be treated differently from longstanding residents. The record, however, simply does not substantiate appellant's impression that the tax is not administered as represented.

The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). "The tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using these highways." *Leverson v. Conway*, 481 A.2d at 1034.

Vt. Stat. Ann. tit. 32, § 8911(9) provides that the motor vehicle purchase and use tax is inapplicable to,

> "Pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax, the tax due shall be the difference."

Thus, a Vermont resident who purchases a car in a reciprocal state for first use in Vermont will receive a credit for tax paid to that reciprocal state. The legislature has the authority to grant exemptions from a tax, unless the classification is wholly arbitrary. *Allied Stores of Ohio Inc. v. Bowers*, 358 U.S. 522, 527 (1959). The obvious objective of such an exemption is to encourage interstate commerce: Residents desiring to purchase a pleasure car for first use in Vermont may shop in the several reciprocal states without having to consider the tax consequences. (Likewise, residents of reciprocal states can shop in Vermont assured that credit will be afforded in the home state if a tax is paid here.) Having already purchased, registered, and used his car in another state at the time he became a Vermont resident, however, there is no rational reason for extending the § 8911(9) credit to appellant. As the court stated,

> "With respect to new residents, such as [appellant] who bring their cars with them they are beyond the reach of any

> policy of encouragement to purchase in this state and there is no reason to exempt them from making a fair contribution to the maintenance and improvement of Vermont's highways."

Leverson v. Conway, 481 A.2d at 1035.

In view of the purpose of the tax, and the purpose of the § 8911(9) credit, appellant's liability should properly be compared to that of any other Vermont resident who purchased the identical car in Vermont at the same time that appellant became a resident. In both cases a 4% tax is imposed and the same amount is exacted.

Accordingly, the case at bar is quite unlike *Hooper v. Bernalillo County Assessor, supra*. There, a benefit was conferred only upon those who had established state residency by a particular date. Here, the § 8911(9) credit is available to any person - regardless of how long or when residency is established - who purchases a vehicle in a reciprocal state that happens to tax non-residents[2] (provided that it is first registered in Vermont). Unlike *Hooper*, the appellant did not receive the credit, not "because he had not been a Vermont resident at some time in the past," Petition at 2-3, but because it would have resulted in preferential treatment. The right to travel does not include a right to preferential treatment. *Shapiro v. Thompson*, 394 U.S. 618 (1968).

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[2]It has been observed that "all states appear to provide that an out-of-state purchaser of an automobile may avoid the payment of a sales tax in the state of purchase by using a temporary license plate which will be valid long enough for him to return to his home state." *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E. 2d 604, 613 (W. Va. 1980). As a practical matter it would thus appear that the current availability of the § 8911(9) credit is more a matter of form than substance, for even if the vehicle were purchased in a reciprocal state the Vermonter would still be liable for this state's 4% use tax. To extend the credit to newcomers who bring their vehicles with them would therefore enable them to escape payment for the use of this state's facilities at the expense of all other residents.

II. THE COURT SHOULD AFFIRM ITS ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION UNDER THE COMMERCE CLAUSE.

It is important to emphasize that appellant had purchased, registered, and used his automobile in Wisconsin before he established residency in Vermont, and before he became legally obligated to register it here. Hence, the facts establish that appellant's activities did not constitute interstate commerce, but that he was involved in two separate intrastate events, one in Wisconsin and one in Vermont. See *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E. 2d 604 (W. Va. 1980).

The Court has long recognized that the Commerce Clause does not prevent a state from imposing a non-discriminatory tax on the possession of property, *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17 (1934) or on the use of property, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), even though it may subsequently enter interstate commerce. Similarly, articles that have been transported interstate and which have come to rest are no longer held to be within that stream of commerce, and can be subjected to a non-discriminatory use tax, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963), or property tax. *Brown v. Houston*, 114 U.S. 622 (1885).

In *Henneford, supra*, the Court upheld a compensating use tax, noting that everyone, regardless of where the article may have been purchased, received credit for sales tax paid thereon. Unlike the tax *sub judice*, which is user-based, and the proceeds of which are earmarked for specific highway pruposes, Vt. Stat. Ann. tit. 32, § 8901, the tax in *Henneford* was a general revenue raising device. The distinction between a user-based levy and other taxes was recognized in *Commonwealth Edison v. Montana*, 453 U.S. 609, 621, 622 n. 12 (1981) where it was stated,

> "Consequently, in reviewing appellant's contentions, we put to one side those cases in which the court reviewed challenges to 'user fees', or 'taxes' that were designed and defended as a

> specific charge imposed by the State for use of state-owned or state-provided transportation or other facilities and services . . . . As the court has stated, 'such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes'."

Nor is there any logic in requiring Vermont, under the Commerce Clause, to extend the credit to appellant in these circumstances. Appellant chose to buy his car in Wisconsin while he was a resident of that state and with the intention of using it there. He was liable for its sales tax, and by paying that tax and complying with Wisconsin's registration laws obtained privileges of a scope and nature to which no Vermont resident could obviously lay claim. That appellant may have used it there only briefly is of no moment: "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 U.S. 285, 289 (1935).

It is, of course, purely conjectural whether other states may respond to the affirmation of the Vermont Supreme Court's decision by repealing credits, Petition at 4, which they were never constitutionally obligated to bestow. Indeed, similar contentions were rejected in *Evansville-Vandenburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707, 721 (1972), (holding that a governmental charge of $1 on interstate and intrastate airline passengers did not violate the Equal Protection Clause, Commerce Clause, or the right to travel), where the Court stated that it is,

> "settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike. The principle

that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. See *Shapiro v. Thompson*, 394 U.S. 618 (1969). The facility provided at public expense aids rather than hinders the right to travel." *Id.*, at 714.

* * *

"[T]here is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel." *Id.*, at 722.

On the other hand, reversal would result in a radical intrusion into the reserved power of the states, and judicial interference with matters which traditionally have been held to be within the authority and expertise of the legislature. As stated in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1977),

"While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."

Appellant did nothing commercial; he simply established Vermont residency, and as a resident became liable for this state's use tax. To hold that the Commerce Clause is implicated and that the credit is mandated simply because "property may be moved from state to state many times," and "may be subjected to multiple use taxes," Petition at 5, is to effectively overrule the fundamental power and necessity of the state to finance its services by way of taxation. It ignores the services provided by a state in deference to a methodology which will favor and enrich the state of purchase, even though the item may be used at considerable expense to the taxpayers of another state.

"Equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963). Appellant's Commerce Clause challenge, "made seemingly attractive by high-sounding suggestions of inequality and unfairness," *Austin v. New Hampshire*, 420 U.S. 656, 670 (1975) (Blackmun, J., dissenting) ignores not only the equality of treatment by Vermont of those who are similarly situated, but also the very purpose of the tax, and the laudable purpose of the limited credit. Accordingly, a substantial federal question is not presented.

III. CONCLUSION: THE COURT SHOULD DENY THE PETITION FOR REHEARING AND SHOULD AFFIRM ITS ORDER DISMISSING THIS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

In response to the Jurisdictional Statement appellee submitted a Motion to Dismiss or Affirm. In response to the Jurisdictional Statement filed in *Williams v. Conway*, 84-592 (U.S. Dec. 10, 1984), appellee waived the Motion to Dismiss or Affirm, referring the Court to the fact that the Motion had been filed in the case at bar, and that the Vermont Supreme Court's decision in *Williams* simply provided that the case was controlled by its decision in *Leverson*. The Court dismissed this appeal but noted probable jurisdiction in *Williams*.

If probable jurisdiction is noted in *Williams*, it follows

that probable jurisdiciton should also be noted in *Leverson*. For the reasons set forth above, however, and in the Motion to Dismiss or Affirm, it is respectfully submitted that substantial questions are not presented in either of these companion cases.

Respectfully submitted,

Andrew M. Eschen
Assistant Attorney General
Office of the Attorney General
133 State Street
Montpelier, Vermont 05602
(802) 828-2831

ATTORNEY FOR APPELLEE

Office-Supreme Court, U.S.
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PETITION FOR REHEARING

Leonard G. Leverson
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

Pro se

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Appellee.

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PETITION FOR REHEARING

Appellant respectfully moves this Court for an order (1) vacating its order of October 29, 1984, dismissing the appeal herein for want of a substantial federal

question, and (2) noting probable jurisdiction. Appellant's grounds for this motion are as follows:

> I. THIS COURT SHOULD GRANT A REHEARING IN LIGHT OF ITS NOTATION OF PROBABLE JURISDICTION IN HOOPER V. BERNALILLO COUNTY ASSESSOR, NO. 84-231 (U.S. Oct. 9, 1984).

Since the filing of the jurisdictional pleadings in this case, this Court has noted probable jurisdiction in another case raising the question whether it violates the Equal Protection Clause to grant state tax benefits to residents of longstanding while denying them to newcomers. Hooper v. Bernalillo County Assessor, No. 84-231, 53 U.S.L.W. 3269 (U.S. Oct. 9, 1984). This case, like Hooper, involves a partial tax exemption denied newcomers because they were not residents of the taxing state at some

time in the past -- here, the time they bought their cars.

Indeed, the burden on newcomers to Vermont at issue in this case affects more people than does the burden on newcomers at issue in Hooper. The tax exemption challenged in Hooper is only available to veterans who became residents of New Mexico before May 8, 1976. Only newcomers to New Mexico who are veterans and who own property subject to taxation suffer the "burden" of that state's discriminatory tax system.[1] Here,

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[1] Cf. Zobel v. Williams, 102 S.Ct. 2309, 2321 n.6 (1982) (O'Connor, J., concurring in the judgment):

"The 'burden' imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former state. The Clause addresses only difference in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens."

all newcomers to Vermont, veterans and non-veterans alike, who own cars are penalized in comparison to all Vermont residents of longer standing.

As Justice Powell has remarked in another context, "[t]he threat of multiple taxation based solely on domicile simply is incompatible with the structural principles of a federal system recognizing as 'fundamental' a constitutional right to travel." Cory v. White, 102 S.Ct. 2325, 2334 (1982) (Powell, J., dissenting, joined by Marshall and Stevens, JJ.); see also id. at 2330 (Brennan, J., concurring in the judgment). In this case, Vermont imposes a form of multiple taxation -- a use tax with no credit for sales tax paid another state -- only on those who were residents of another state at the time they purchased their cars. This case,

like Hooper, thus squarely presents the question whether the structural principles of our federal system permit a state's tax laws to treat some residents of that state less favorably than others solely because the disfavored residents were previously domiciled in another state.

If the denial of a partial tax exemption on property of new residents of New Mexico who are veterans raises a substantial federal question, the denial of a partial tax exemption on motor vehicles of new residents of Vermont surely does so, too. Indeed, the similarity between the issues presented in Hooper and in this case would justify hearing the two cases in tandem, so that this Court could explore in greater detail the proposed justifications and appropriate standard of review for state tax laws that benefit

established residents at the expense of newcomers.

In particular, both cases present this Court an opportunity to clarify the application of right to travel precepts to economic penalties on newcomers which do not fall into the category of denials of "vital benefits" or "basic necessities of life." See Salibra v. Supreme Court of Ohio, 730 F.2d 1059, 1065 (6th Cir.) (suggesting right to travel precepts do not apply unless benefit is "vital") (dictum), cert. denied, 53 U.S.L.W. 3289 (1984); Hooper v. Bernalillo County Assessor, 101 N.M. 172, 679 P.2d 840, 843 (Ct. App.) (distinguishing tax exemption from "such fundamental interests as voting, welfare benefits, or public medical assistance"), cert. denied, 101 N.M. 77, 678 P.2d 705, prob. juris. noted, No. 84-231, 53 U.S.L.W.

3269 (U.S. Oct. 9, 1984); Williams v. Vermont, No. S436-82WnC, unpublished op. at 5 (Vt. Super. Feb. 24, 1983) (Shapiro v. Thompson distinguishable from denial to newcomer of tax credit because denial of tax credit is not a severe penalty and has no dire effects), aff'd mem., 478 A.2d 993 (Vt.), appeal docketed, No. 84-592, 53 U.S.L.W. 3326 (1984); cf. Zobel v. Williams, 102 S.Ct. 2309, 2319-23 (1982) (O'Connor, J., concurring in the judgment) (suggesting an alternative analysis of right to travel claims based on Article IV's Privileges and Immunities Clause).

The notion that states may discriminate against new residents where the discrimination does not result in the denial of a "vital" benefit is a mischievous one, yet seems to be gaining credence. This rule would require courts to identify certain

"vital" benefits (free nonemergency asthma treatments and the like) and to subject any denial thereof to strict scrutiny, while allowing the denial to new residents of such non-"vital" privileges as the ability to drive one's automobile to pass muster upon articulation of a rational basis. This unsatisfactory distinction between "vital" and non-"vital" benefits (not addressed in Zobel v. Williams, 102 S.Ct. 2309 (1982), because the law at issue lacked a rational basis) would be superfluous were the Court to adopt the test Justice O'Connor proposed in Zobel.

The similarity of the right to travel issue in this case to that in Hooper may have been obfuscated by the argument appellee made in his Motion to Dismiss or Affirm that the Vermont Motor Vehicle Purchase and Use Tax does not discriminate against new

residents. That argument was predicated on incorrect premises.[2] The Vermont Supreme Court, unlike the appellee, did not pretend that the tax does not discriminate against new residents. But the Vermont court found a rational basis for the discrimination.

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[2] "If [a Vermont resident's car] were permanently registered elsewhere the owner would not be considered a Vermont resident for purposes of the § 8911(9) credit. Vt. Stat. Ann. tit. 32, § 8911(9)." Motion to Dismiss or Affirm, at 4. Nothing in the text of the statute cited or in any other source of Vermont law supports this assertion. As counsel for the appellee conceded under questioning at oral argument below, cars and trucks may be and frequently are registered in more than one state. No Vermont law deems the owner of a car registered in both Vermont and another state to be, ipso facto, a nonresident of Vermont, even if the car were first registered in the state other than Vermont. Contrary to appellee's suggestion, Vt. Stat. Ann. tit. 23, § 301 only requires Vermont residents to register their cars there when they begin to use them on Vermont roads. Leverson v. Conway, 481 A.2d 1029, 1033 (Vt. 1984) (Jurisd. Statement 13a) ("Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it") (emphasis supplied).

Leverson v. Conway, 481 A.2d 1029, 1032-35 (Vt. 1984) (Jurisd. Statement 16a-24a).

Whether rational basis scrutiny suffices, however, is itself a substantial federal question. Compare Shapiro v. Thompson, 394 U.S. 618, 634 (1968) (laws that penalize right to travel must be subject to strict scrutiny) and Austin v. New Hampshire, 420 U.S. 656, 663 (1975) (Article IV's Privileges and Immunities Clause "erect[s] a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions") with Sosna v. Iowa, 419 U.S. 393 (1975) (apparently adopting a rational basis standard) and Zobel v. Williams, 102 S.Ct. 2309, 2313-15 (1982) (reserving decision as to whether an economic penalty of a non-"vital"

nature against new residents must be judged by a standard higher than rational basis scrutiny).

Because this case, like Hooper, involves a denial of tax benefits to certain residents of the taxing state based on when they established residence, and because the application of this Court's right to travel precedents to this issue raises a substantial federal question, this Court should vacate its order dismissing the appeal in this case and note probable jurisdiction.

II. THE COMMERCE CLAUSE ISSUE IS SUBSTANTIAL.

This Court has twice expressly reserved decision on the Commerce Clause issue this case presents; individual Justices have expressed opposing views; the lower courts are split; and the great bulk of scholarly commentary is inconsistent

with the approach to the issue the Vermont Supreme Court adopted. True, as Justice Brennan has noted, the Court has "intimated" that a credit against use tax for sales tax paid other states may not be constitutionally required. Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 77 (1963) (Brennan, J., concurring) (citing Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1937)). But, only last year, another Justice of this Court cited Henneford in a way that may fairly be read as intimating a different view.[3]

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[3] "In Henneford, a 2% tax was imposed on the privilege of using products coming from other states. Excepted from the tax was any property, the sale or use of which, had already been subjected to an equal or greater tax. The Court, speaking through Justice Cardozo, upheld the use tax, noting that 'When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates.'" Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 103 S.Ct. 1365, 1377 n.3 (1983) (White, J., concurring in part and dissenting in part).

Summary dismissal of this appeal is not an appropriate means for resolution of which of the conflicting 'intimations' contained in Supreme Court dicta ought to be the law. The effect of this Court's summary decision that a use tax without credit for sales tax paid another state is constitutionally permissible will go far beyond influencing the decisions of persons contemplating residence in Vermont who are considering when and where to buy a car, truck, or mobile home.

If this Court allows the dismissal of this appeal to stand, it will signal to the overwhelming majority of states that currently provide a use tax credit for sales tax paid other states that those credit mechanisms are not constitutionally required. The repeal of

those credits would have a far-ranging impact on commerce. Large, expensive mobile equipment, such as automobiles, trucks, oil drilling rigs, construction equipment, and the like, could be subject to annual or more frequent use taxation of 4, 5, or 6 percent or more, depending upon how often such property was moved from state to state. Manufacturers and other consumers of equipment would have a powerful incentive to alter their property use patterns in economically inefficient ways. See Appendix A hereto.

A use tax without a credit for sales tax paid another state, though facially neutral, operates as a tariff on goods imported from other states. Cf. Moorman Manufacturing Co. v. Bair, 437 U.S. 267,

283-89 (1978) (Powell, J., dissenting, joined by Blackmun, J.).[4] This is so because the movement of property from one state to another is not truly a "substantially equivalent event" to a sale; property may be moved from state to state many times while it is owned by the same owner. Where property is moved from state to state and subjected to multiple use taxes, it bears a burden that is not borne where commerce is strictly local. It ought to be remembered that one of the principal reasons for the enactment of the Constitution

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[4] Compare also id. at 287-88 ("[n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state....") (quoting from Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)) with Leverson v. Conway, 481 A.2d 1029, 1035 (Vt. 1984) (Jurisd. Statement 21a) (one of the purposes of the Vermont Motor Vehicle Purchase and Use Tax's denial of credit to nonexempt persons is to "encourag[e] purchases within the state").

was to put an end to the proliferation of state tariffs that existed under the Articles of Confederation.

Appellant respectfully submits that the Commerce Clause issue this case raises should not be decided without plenary consideration of all the effects that may result from a holding that use tax states need not give credit for sales tax paid other states.

CONCLUSION

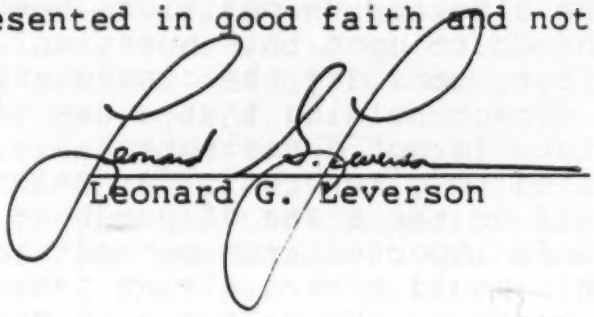
For the reasons set forth above, as well as those contained in the Jurisdictional Statement, appellant prays that this Court grant rehearing of the order dismissing the appeal, vacate that order, note probable jurisdiction, and review the judgment of the Supreme Court of Vermont.

Respectfully submitted,

Leonard G. Leverson
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
Pro se

CERTIFICATE OF APPELLANT

As appellant, pro se, I hereby certify that this petition for rehearing is presented in good faith and not for delay.



Leonard G. Leverson

APPENDIX A

Comment, Compensating Use Taxes, 18 Ark. L. Rev. 321, 338-39 (1964-65):

> What effects will follow from the alternative positions open to the Court upon this question? First, consider the consequences of a direct holding that a use tax state is not constitutionally obligated to give credit for sales taxes paid in the state of purchase on goods imported from out-of-state. This would give a strong incentive for states which have such provisions to repeal them. The various states could then give their own merchants a positive advantage over their out-of-state competitors through the taxation statutes at the expense of the national common market. Many transactions which have substantial contact with more than one state would be liable to a potential multiple taxation not borne by the local competitor. This possibility may be greater today due to the apparently more liberal treatment with respect to the imposition of sales taxes than was manifested at the time the Silas Mason case was decided. In essence, it would to a degree subject interstate trade to the mercy of lawmakers whose objectivity might be affected by considerations of short-run self-interest. Such an attitude appears to have little virtue other than consonance with the idea that every state has the right to frame its tax structure without reference to what other states have done.

Following the other alternative would appear to be in the interest of the nation in the long run. To require that credit be given for sales tax paid in the state of purchase would assure relative equality of consumption tax burden between in-state and out-of-state purchasers, and at the same time would allow the use tax to achieve one of its ostensible legitimate goals, i.e., to neutralize the incentive to avoid sales tax through out-of-state purchasing. In view of the comparatively small yield from use taxes it could hardly be said that such a position would bring about a fiscal disaster at the state level. On the whole it seems this position would allow consumption taxes to be utilized as a means for raising revenue and protecting the sales tax without placing interstate commerce at a competitive disadvantage. As has been stated by a former member of the Court, this is a choice "between the state of origin and that of market [State of consumption] for the exercise of the exclusive power to tax . . ." The burden caused when both a sales and use tax are levied could be equally well eliminated by prohibiting the state of sale from levying any excise thereon. However, practical as well as conceptualistic difficulties appear to render this an unlikely solution to the problem. In the final analysis, the offsetting credit provision appears to be a proper safeguard to keep interstate trade unfettered by provincialisms manifested in taxing statutes.
(footnotes omitted).